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July 19, 1991

MEMORANDUM

Attached are the new amendments to SB 376 proposed by Assemblyman Felando, which we understand some companies already have received. We will be discussing these amendments in our conference call on Monday, July 22, at 10 a.m.

Following is a brief analysis of the amendments.

AMENDMENT 1. The amendment would delete the definitions of "sample" and "sampling."

AMENDMENT 2. The amendment would delete the title of the sampling chapter ("SAMPLING AND OTHER PROMOTION").

AMENDMENT 3. The amendment would insert a new title for the sampling chapter ("TOBACCO DISTRIBUTION").

AMENDMENT 4. The amendment would delete the sampling chapter and insert in its place a new Section 30300. This new section incorporates SB 1100 (the Bergeson bill) without the clarifying amendments adopted by the Government

LG 2024047

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- 2 -

Organization Committee when it passed the bill on July 15.

The new section consists of five subdivisions:

Subdivision (a). This subdivision sets forth eleven purported "findings" concerning smoking and health, the social costs of smoking, tobacco use by minors, and tobacco product advertising and promotion as a cause of youth smoking. Such findings might have significance in product liability litigation if the Sher bill eventually should pass and the industry should lose the protection it enjoys currently under California law. On the other hand, a few other states already have enacted laws that incorporate similar findings.^{1/} Prop 99 enacted purported findings on the primary issue and ETS, and the California Legislature enacted ETS findings in 1987 legislation concerning smoking on public and private transportation facilities (which SB 376 would repeal).

Subdivision (b). This subdivision bans sampling ("nonsale distribution") "in any public building, park or playground, or on any sidewalk, street or other public grounds." The subdivision also would prohibit the distribution of coupons at these locations. This subdivision does

^{1/} E.g., Chapter 70 of the Vermont Laws of 1991 (primary smoking); Chapter 85 of the New Mexico Laws of 1985 (primary smoking); Chapter 539 of the Montana Laws of 1991 (ETS); Chapter 384 of the Oregon Laws of 1981 (ETS).

COVINGTON & BURLING

- 3 -

not purport to prohibit sampling in a retail establishment unless the establishment is located in one of the forbidden locations. On its face, the subdivision would prohibit newspapers and magazines sold at sidewalk newsstands from carrying coupons.

Subdivision (c). This subdivision defines "distribution" and "smokeless tobacco."

Subdivision (d). This subdivision specifies penalties. Each sample or coupon distributed in violation of the law would be a separate offense.

Subdivision (e). This subdivision disclaims preemptive intent and provides that local enactments, if more restrictive than state law, shall control.

The amendments adopted by the Government Organization Committee when it passed SB 1100, but not included in Assemblyman Felando's proposed amendments, broadly define the "public" locations at which sampling would be prohibited. They further define "nonsale distribution" so as (1) to allow newspapers and magazines sold at the forbidden locations to continue to carry coupons, and (2) to allow point-of-sale sampling and couponing at retail establishments located in those locations to continue as well. A copy of these amendments is attached.

With the amendments adopted by the Committee, SB 1100 would have gone beyond the cigarette manufacturers'

LG 2024049

COVINGTON & BURLING

- 4 -

voluntary code to prohibit sampling at street fairs and other events even in places off-limits to persons under 18. On the other hand, with the amendments, the bill would protect couponing through periodicals and point-of-sale sampling at retail establishments located in public places. That protection, however, would be essentially meaningless to the smokeless manufacturers, who depend heavily on worksite and event sampling.

AMENDMENTS 4-6. These conforming amendments would delete references to sampling licenses in Chapter 5, which provides for license suspension or revocation.

AMENDMENTS 7-8. These amendments would extend the billboard advertising ban to include billboards located within 500 feet of any college or university (not just elementary schools, junior high schools, and high schools) and would make clear that the ban applies to private as well as public schools.

With or without these amendments, the billboard advertising provision is preempted by the Federal Cigarette Labeling and Advertising Act. The fact that SB 376, without the amendments, does no more than enact the billboard provision of the industry's voluntary code can account for the industry's willingness to acquiesce in the legislation notwithstanding preemption. Extending the billboard advertising ban to include colleges and universities would go beyond the

LG 2024050

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- 5 -

billboard provision of our voluntary code. Arguably, however, it would still be consistent with other provisions of the code that prohibit advertising directed primarily to those under 21.

AMENDMENT 9. This amendment would make explicit that shopping malls and bowling alleys are "public places" within the meaning of SB 376.

AMENDMENT 10. This amendment would extend the smoking-restriction provisions of the bill as follows:

- **Restaurants.** Smoking would be prohibited completely except as provided in Section 30700(c)(4), which would exempt rooms where private functions are being held. Under SB 376 in its current form, smoking may be permitted in up to 50 percent of the service area, with a contiguous area of not less than 50 percent required to be designated as a nonsmoking area.

- **Bars.** Smoking would be limited to 50 percent of the service area of a bar, with a contiguous area of not less than 50 percent required to be designated as a nonsmoking area. Under SB 376 in its current form, bars are completely exempt.

- **Pool halls.** Smoking would be limited to 50 percent of the area of a pool hall, with a contiguous area of not less than 50 percent required to be designated as a

LG 2024051

COVINGTON & BURLING

- 6 -

nonsmoking area. No mention of pool halls appears in SB 376 currently.

• Sports arenas. Smoking would be prohibited completely in indoor and outdoor sports arenas, except in designated enclosed private boxes. Under SB 376 in its current form, smoking is permitted in private boxes of indoor sports arenas and in up to 25 percent of the concourse area of indoor sports arenas. The seating areas of outdoor sports arenas are not enclosed indoor areas and thus currently are not "public places" subject to smoking restrictions under the bill.

• Office buildings, hotels, motels. Smoking would be prohibited completely in public areas of office buildings, hotels and motels. Under SB 376 in its current form, smoking is permitted without limitation in the public areas of hotels and motels, and in up to 25 percent of the public areas of office buildings.

• Shopping malls and bowling alleys. Smoking would be prohibited completely in shopping malls and bowling alleys. Under SB 376 in its current form, smoking is permitted in up to 25 percent of the public areas of shopping malls and of the concourse areas of bowling alleys.

AMENDMENT 11. This amendment would delete the provision of existing law, reenacted in SB 376, that permits

LG 2024052

COVINGTON & BURLING

- 7 -

smoking in up to 25 percent of a waiting room in a train or bus station or airport.

AMENDMENT 12. This amendment would limit the industrial-facility exemption in the workplace chapter by providing that not less than 50 percent of the area of an industrial facility must be designated as a nonsmoking area.

AMENDMENT 13. This amendment would qualify the preemption provision to permit more stringent local sampling ordinances.

AMENDMENT 14. This amendment would extend the grandfather date in the preemption provision from July 1, 1991, to July 1, 1992. Such a change would trigger a mad rush between now and then by localities to ban smoking everywhere.

David H. Remes

attachments

cc: Messrs. Chilcote
(by Federal Express)
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Malmgren (by hand)
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